

A **GULA PADANG TERAP PLANTATIONS SDN BHD**

v.

TIAN SOON AGRICULTURE SDN BHD

B HIGH COURT MALAYA, ALOR SETAR
HO MOOI CHING JC
[CIVIL SUIT NO: 22-319-2007]
15 JULY 2009

C **CIVIL PROCEDURE:** *Injunction - Interlocutory mandatory injunction - Whether suitable to grant in present case - Whether balance of convenience and justice leaned more towards not granting it - Whether special circumstances shown to justify granting of an interlocutory mandatory injunction - Evaluation of facts and evidence - Effect of - Whether damages adequate remedy - Rules of the High Court 1980, O. 29 r. 1*

D **CIVIL PROCEDURE:** *Jurisdiction - Inherent jurisdiction - Whether suitable for court to exercise*

E **CIVIL PROCEDURE:** *Pleadings - Rules of - Specific rules of the court under which application made not specified - Rules of the High Court silent on whether specific rules have to be mentioned in pleadings - Effect of - Whether a requirement to plead specific rules of the court in pleadings*

F **CONTRACT:** *Lease - Breach - Perusal of terms and conditions of Lease Agreement - Whether defendant in breach - Factors to consider - Evaluation of evidence adduced - Effect of - Whether plaintiff warranted in terminating lease*

By a lease land agreement (exh. SS1 in encl. 8 and hereinafter referred to as the 'said agreement'), Gula Padang Terap Bhd ('GPTB') had leased to the defendant some land planted with rubber for a period of 25 years commencing 1 December 1997, subject to all the terms and conditions contained therein. In consideration thereof, the defendant had paid GPTB a sum of RM5.2 million and had further agreed to pay them 12% of the net revenue generated or the equivalent of the sum computed in Appendix 10 of the said agreement on an annual basis, whichever was the higher, for the period 2003 until the end of the lease in 2022. By a deed of assignment (exh. SS2), of which the defendant claimed no knowledge of, GPTB assigned the lease to the plaintiff which took over all rights and liabilities thereunder. The plaintiff issued a termination notice to the defendant on the ground of a breach of covenants by the latter and claimed against the defendant *vide* encl. 7 for an order of possession, damages, interests and costs. The sole issue that arose for determination before this court was whether the plaintiff's application *vide* encl. 7 ought to be allowed.

Held (dismissing plaintiff's application with costs):

- (1) An applicant should state the order pursuant to which the application had been made *ie*, so that the opponent would not be taken by surprise and would know exactly the case he had to meet. Despite the absence of a specific requirement that any particular rule of court needed to be referred to in any application, it would be good practice to do so. (para 3)
- (2) Since there had been a provision making available the remedy sought, there had not been any grounds for the court to invoke its inherent powers. Had there been no concession on this, the application would have been dismissed on this ground alone. (para 4)
- (3) Clause 1.z of the Said Agreement had clearly not been a unilateral right given to the plaintiff but had been one that had arisen only in the event of a breach of the terms and conditions thereof. By exh. SS5 of encl. 8, the defendant had been said to have breached the terms of the lease agreement. Whether the defendant had been in breach of the said agreement had clearly been a question of fact. Regardless of the status of RRIM Consult Corporation ('RRIMCC') in the industry, their findings had been challenged and there had been serious issues to be tried which could not be done by affidavit evidence alone. Even if there had been proof of some breaches of covenants, it had still remained to be tried whether those breaches had been sufficient to warrant the termination of the lease. The submission that the present case had been akin to building contracts, could not be accepted. (paras 6-7 & 10-11)
- (4) The agreement which had been the subject matter of the dispute in the instant case had been a 25 year lease that had to have been coupled with an interest to make it irrevocable in the absence of lawful termination. Clear provision on that had been made in cl. 1.z thereof. Unlike a builder who would be allowed to go onto the site for the purposes of performing the contract, the defendant had reimbursed the plaintiff the sum of RM5.2 million as the cost of developing the rubber estate and had had some 15 years remaining on the lease at the time of purported termination. Clause 1.y of the said agreement had not been relevant to the present situation as no sale had been involved. Had the parties intended the lessor to be conferred a unilateral right of termination subject to payment of damages, clause 1.y should not have been confined to a sale situation. (paras 11-12)

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- A (5) This had not been a clear case which had to be decided at once. The plaintiff contended that if the order were refused, irreparable damage would happen to the trees, yet if the paramount intention had been to save the trees, more could have been done to convey to the defendant the remedial measures recommended by RRIMCC
- B instead of keeping it from the defendant merely because there had not been any obligation to inform them. It had also been argued that if the order were not given, the defendant would be reaping the benefits of the lease without payment but the defendant had not refused to pay what had been due. Rather it had been the plaintiff
- C who had refused to accept payment. If the order were given, it would amount to a final determination of the dispute, as once ousted, it would be almost impossible to reinstate the defendant. There had not been any special circumstances shown to justify the grant of an interlocutory mandatory injunction. The balance of convenience and justice had lain more against the order sought and
- D in favour of an early hearing, which it was hoped would be concluded well before the expiry of the lease in 2022 if not terminated earlier. It was also doubtful that damages would be an adequate remedy in the circumstances. (para 13)

- E **Case(s) referred to:**
Mayfield Holdings Limited v. Moana Reef Limited [1973] 1 NZLR 309 (*refd*)
MBf Holdings Bhd v. East Asiatic Co (Malaysia) Bhd [1995] 4 CLJ 73 HC (*refd*)
Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC (*refd*)

- F **Legislation referred to:**
Rules of the High Court 1980, O. 14, O. 18 r. 9, O. 29 r. 1(2A), O. 32 r. 1, O. 92 r. 4
Specific Relief Act 1950, s. 7

- G *For the appellant - M Pathmanathan; M/s M Pathmanathan & Co*
For the respondent - KK Nga (Ramavello & BG Lee with him); M/s Ngeh & Co
Reported by Sharmini Pillai

JUDGMENT

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- I **Ho Mooi Ching JC:**

[1] By a 'lease land agreement' dated 30 December 1997 (exh. 'SS1' in encl. 8), Gula Padang Terap Bhd ('GPTB') leased to the defendant land measuring approximately 768.48 hectares in area planted with rubber for a period of 25 years from 1 December 1997. In accordance with the lease, the defendant paid GPTB the sum of RM5.2 million as reimbursement on the development of the rubber plantation and also agreed to pay 12% of net revenue generated or the equivalent of the

sum computed in Appendix 10 of the land lease agreement per year, whichever is the higher, from 2003 until the end of the lease in 2022. By a deed of assignment dated 29 April 2004 (exh. 'SS2') of which the defendant claims to have no knowledge, GPTB assigned the lease to the plaintiff which took over all rights and liabilities under that lease.

[2] The plaintiff issued a termination notice dated 3 January 2007 on the ground of breach of covenants by the defendant and claimed against the defendant an order of possession, damages, interest and costs. The plaintiff then took out a summons in chambers (encl. 7) seeking, *inter alia*, an order that the defendant do peacefully deliver up possession of and vacate the lease land to the plaintiff within seven days on, *inter alia*, the following grounds:

- (i) that the plaintiff has *vide* a notice of termination dated 3 January 2007 terminated the lease land agreement dated 30 December 1997 in accordance with cl. 1.z of the said agreement and required the defendant to surrender the lease land;
- (ii) upon the expiry of the three months notice of termination dated 3 January 2007 by a further notice dated 11 April 2007 the plaintiff gave the defendant notice of re-entry by the plaintiff into the said lease land on or after 11 April 2007; and
- (iii) the defendant has failed and/or refused to surrender possession of the leased land to the plaintiff and continues to wrongfully occupy the said lease land.

On 24 May 2009 this court dismissed the plaintiff's application with costs. The plaintiff appeals against that order and I now set out my grounds.

[3] The notice of application did not specify the rule of court pursuant to which it was made and on inquiry by the court, Dato' Pathmanathan for the plaintiff submitted that neither RHC O. 32 r. 1 nor Form 62 required him to do this. In his written submission in reply, learned counsel for the plaintiff advanced the proposition that it is incorrect to suggest that unless a litigant can point to a particular rule of court, he cannot make an application and the court has the jurisdiction to hear any application and 'to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of court' under RHC O. 92 r. 4. However, if it was necessary to rely on any rule, he said that the application was necessitated by s. 7 of the Specific Relief Act and made under RHC O. 29. In the absence of a reference to any rule of court in the notice of application, Mr Ngeh for the defendant made a submission as if the application was made under RHC O. 14 or O. 18 r. 9. After it was clear that the application was made under RHC

- A O. 29, learned defence counsel asked for time to submit on O. 29. It is exactly for this reason that an applicant should state the order pursuant to which an application is made so that the opponent is not taken by surprise and knows the case he has to meet. Despite the absence of a specific requirement that any particular rule of court be referred to in any application, it must be good practice to do so. It is surely not for the opponent to be kept guessing as to the applicable rule, particularly so as apart from the different requirements of each rule, there is a whole body of authorities applicable to each. As to the written submission made for the defence in respect of O. 29, I would at the outset say that I agree with the plaintiff that O. 29 r. 1(2A) is inapplicable to this case as it only governs *ex parte* applications, which this is not.
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- [4] After referring to RHC O. 92 r. 4, the Supreme Court in *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244, said ‘We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or any abuse of its own process. It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers’. Dato’ Pathmanathan did ultimately concede that the application was made under RHC O. 29. It follows that since there is a provision making available the remedy sought, there is no ground for the court to invoke its inherent powers. Had there been no concession on this, the court would have been justified to dismiss the application on this ground.
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- [5] RHC O. 29 r. 1 provides that an application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in the party’s writ. The order compelling the defendant to deliver vacant possession is in the nature of a mandatory injunction (see *MBf Holdings Bhd v. East Asiatic Co (Malaysia) Bhd* [1995] 4 CLJ 73 at 75). In that case, KC Vohrah J said:
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- The ordinary *American Cyanamid* principles are not applicable in an application for a mandatory injunction. In the case of a mandatory interlocutory injunction for its grant there must be a high degree of assurance that at the trial it will appear that the injunction was rightly granted (*Shepherd Homes Ltd v. Sandham* [1971] Ch 340; *Locabail International Finance Ltd v. Agroexport* [1986] 1 WLR 657). This is far more than is required for a prohibitory injunction to which the *American Cyanamid* principles apply.
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As put by L.A. Sheridan (*ibid*, p. 35).

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That may be no more than a way of saying that the balance of convenience is more often against a mandatory injunction than it is against a prohibitory injunction at the interlocutory stage because an interlocutory mandatory injunction is more likely to involve the Defendant in expenditure, more likely to be the final determination of the dispute and more difficult to compensate if the Defendant wins at the trial.

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In *Jakeman v. South West Thames Regional Health Authority* [1990] IRLR 62, Auld J said that in the absence of special circumstances an interlocutory mandatory injunction would not be granted unless the case was clear and one which should be decided at once.

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[6] The material part of cl. 1.z of the lease agreement provides that:

In the event of a breach of the terms and conditions of this agreement by the lessee, the lessor shall reserve the right to rescind this agreement by giving 3 months notice

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This is clearly not a unilateral right given to the plaintiff but one that arises only in the event of a breach of the terms and conditions of the agreement. By the notice of termination dated 3 January 2007 (exh. 'SS5' in the affidavit of Dato' Shahabudin bin Shafie (encl. 8) the defendant was said to have breached the terms of the lease agreement in particular, cls. 1.f., 1.j. and 1.x. thereof in the following manner:

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(a) poor latex exploitation techniques such as wrong tapping direction, double panel tapping, incomplete half-spiral panel tapping; excessive tree wounding and high bark consumption resulting in irreversible damage to the trees and premature reduction of their commercially viable lifespan;

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(b) The said area was discovered to be poorly maintained with dense undesirable weeds, which has affected the productivity; reduces tree girth increment which affects future rubberwood production and

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(c) The fertiliser used is inadequate, totally inappropriate and imbalanced to ensure optimum soil fertility for maximum tree growth and latex production.

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The three covenants the defendant is alleged to have offended are:

1.f. to uphold and maintain a high reasonable standard of field conditions according to standard norm of field maintenance practices in the plantation industry;

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1.j. not to commit or suffer any wilful or voluntary waste spoil or destruction on the said lease land ...; and

1.x. to upkeep and maintain the lease land in good husbandry (sic).

- A [7] Whether or not the defendant has indeed breached the terms of the agreement is clearly a question of fact. The plaintiff alleges that sometime in early 2005 it discovered that severe and extensive damage was inflicted on rubber trees on the leased land due to careless and unprofessional tapping methods employed in the extraction of latex. In
- B May 2005 it engaged the professional services of RRIM Consult Corporation ('RRIMCC'), a corporation of the Malaysian Rubber Board established under the Ministry of Plantation Industries and Commodities (RRIM) 'to assess the tapping standard and yield and also to investigate the maintenance standard as to the agronomic practices currently observed in GPT rubber areas' (see RRIMCC's report 'SS3' dated
- C 12 July 2005 exhibited in Dato' Shahabudin bin Shafie's affidavit marked encl. 8). RRIMCC found that current weed control was only partially effective (at p. 5 of SS3) and recommended more effective methods (p. 12 of the report). Although the leaf canopy density was reportedly fairly good to good in most of the rubber blocks it was said that the
- D actual health and nutritional status of the trees could only be ascertained by leaf sampling. Soil and foliar tests were recommended to determine the actual requirements of the trees so that fertilisers could be applied based on those needs rather than according to the current practice of applying fertiliser inappropriately. It was also reported that 'by normal
- E standard, renewed bark in GPT rubber areas is generally too thin, too much prior wounding and possibly poor in yield' and some illustrations were given of the wrong tapping systems adopted by the current tapping contractors in GPT. It was recommended that immediate corrective measures be taken to monitor and change the wrong tapping systems.
- F [8] In the second field assessment in August 2006 RRIMCC (see exh. 'SS4') reported that the weeds in the rubber fields were better controlled compared to the previous visit. Again, it was observed that the nutritional status of the trees could not be determined without a soil and leaf analysis and the fertiliser input used was done blindly without
- G knowing the needs of the trees. The sticking point was still incorrect tapping methods which required corrective measures to be implemented without delay (p. 7 of SS4). It was also recommended that the plaintiff should station personnel to monitor the daily crop and field management practices. There was no evidence that the recommendations for corrective
- H measures were brought to the attention of the defendant. In fact, despite the defendant's requests to be supplied with the reports by letters dated 14 March 2007 and 17 December 2007, they were only supplied with them until 28 January 2008. The plaintiff's answer to this complaint is that there was no obligation to supply them as they were commissioned
- I at its own expense. The plaintiff also commissioned a third report from RRIMCC.

[9] The defendant denied breach of the covenants relied on by the plaintiff. Affidavits were filed to challenge the correctness of the findings in the RRIMCC reports including that of one Lim Ban Kay (encl. 11), a director of the defendant company, that of one Ding Ling Ching (encl. 18) who claimed to have 50 years' experience in rubber planting challenging the assertion of Dato' Shahabuddin that it was the practice to stop rubber tapping during the dry season. This was, of course, met with an affidavit-in-reply (encl. 22) challenging Ding's experience and his 'expertise'. There is also evidence that the defendant had taken on some of the staff of the plaintiff and it was contended that they should have been in a position to oversee the tapping methods. The defendant also disputed that RRIMCC's findings were representative of the entire estate since one of the reports was stated to have been done in one visit and the estate comprises various lots of land that are some distance away from each other.

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[10] The plaintiff's stand is that RRIMC are the undisputed leading consultants in rubber research of international repute and as their reports had not been rebutted by a professional report, an adverse inference should be drawn and the plaintiff be granted the relief it seeks in order to save the rubber trees from irreparable damage from the defendant's exploitative slaughter tapping motivated by greed. However, regardless of the status of RRIMCC in the industry, their findings have been challenged and there are serious issues to be tried which cannot be done by affidavit evidence alone. Even if there is proof of some breaches of covenants, it still remains to be tried whether they are breaches that are sufficient to warrant termination of the lease. It was submitted for the plaintiff that the issue of whether termination was wrongful can be tried at the main trial, and the defendant can be adequately compensated by costs if it succeeds in proving wrongful termination.

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[11] In support, reference was made to cases involving building contracts. I am unable to accept the submission that the present situation is akin to building contracts where the employer appoints a contractor to enter his land and undertake the construction of buildings. In such cases, the employer may terminate the contract on an alleged breach and even where the termination is challenged the contractor has no right to remain on the site, pending the determination of the issue at the trial. In these cases including that of *Mayfield Holdings Limited v. Moana Reef Limited* [1973] 1 NZLR 309, so heavily relied on by the plaintiff, the builder is only granted a licence to go on to the land to erect a building, not a licence coupled with an interest so as to make it irrevocable in the absence of lawful termination. The agreement that is the subject matter of the dispute in the instant case is a 25 year lease that must surely be coupled with an interest to make it irrevocable in the absence of lawful termination. In fact, that is a clear provision of cl. 1.z. Unlike

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- A a builder who is allowed to go onto the site for the purpose of performing a contract, the defendant had reimbursed the plaintiff the sum of RM5.2 million as the cost of developing the rubber estate and had some 15 years remaining on the lease at the time of the purported termination.
- B [12] It was also argued for the plaintiff that the right to possession is not unqualified as cl. 1.y of the lease agreement required the defendant to surrender the land if the plaintiff wished to sell the lands to a third party, subject to payment of compensation computed in accordance with Appendix 10. With respect, I fail to see how that clause is of any
- C relevance in the present situation where no sale is involved. Had the parties intended that the lessor be conferred a unilateral right of termination subject to payment of damages, if proved, clause 1.y should have not have been confined to a sale situation.
- D [13] This is not a clear case which must be decided at once. The plaintiff contended that if the order is refused, there would be irreparable damage to the trees, yet if the paramount intention is to save the trees, more could have been done to convey to the defendant the remedial measures recommended by RRIMCC instead of keeping them from the
- E defendant merely because there was no obligation to inform the defendant. It was also argued that if the order was not given the defendants would be reaping the benefits of the lease without payment but the defendant has not refused to pay what is due. Rather it is the plaintiff which has refused to accept payment (understandably, as it may prejudice their case). If the order is given, it would amount to a final
- F determination of the dispute as once ousted, it would be almost impossible to reinstate the defendant. After all, it has been submitted for the plaintiff that by the time the trial is completed, the term of the lease may well have expired. It has not been shown that there is a high degree of assurance that at the trial it will appear that the injunction was
- G rightly granted. There are no special circumstances which justify the grant of an interlocutory mandatory injunction. The balance of convenience and justice lies more against the order sought and in favour of an early hearing, which it is hoped will be completed well before 2022 when the lease expires if not terminated earlier (despite the
- H nuisance of interlocutory applications). It is also doubtful that damages will be an adequate remedy in the circumstances.

[14] In the premises, the application was dismissed with costs.

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